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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LEE RAKESTRAW, JOHN L. BARKER, ALLEN E. BARSETH, *ET AL.*,

Petitioners,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL AND UNITED AIRLINES, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

		PAGE
1.	ISSUES CORRECTLY STATED	1
2.	ALPA ANIMUS–TWO-COURT RULE	2
3.	ALPA'S IMPLAUSIBLE FACTUAL PRESENTATION	3
4.	DEGREE OF SCRUTINY OF UNION ACTIONS TOWARD MINORITIES	5
5.	DISREGARD OF UNION AGREEMENTS ..	6
6.	STANDARDS IN MIXED MOTIVE CASE ..	7
CONCLUSION		7

TABLE OF AUTHORITIES

Cases	PAGE(S)
ALPA v. United Airlines, Inc., 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987) . . .	4
Ford Motor Co. v. Huffman, 345 U.S. 330 (1953) .	2
Goodman v. Lukens Steel Co., 482 U.S. 656 (1987) . .	3
NLRB v. Curtin-Matheson Scientific, Inc., 494 U.S. 775 (1990)	6

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This reply will respond to certain contentions of respondent Air Line Pilots Association ("ALPA").

1. ISSUES CORRECTLY STATED

ALPA depicts the Petition as a quarrel with the Seventh Circuit's "writing style" (Br. in Opp. 11). Yet at times ALPA admits that its real position is that "the court below correctly concluded that ALPA's motives—mixed or otherwise—were legally irrelevant to measuring the union's conduct under the duty of fair representation . . . ." (Br. in Opp. 16-17); and that "unions are not subject to any distinct, especially strict duty of fair representation stan-

dard when they negotiate to revise existing seniority rights in the absence of a corporate merger" (*id.* 14).[1] As other circuits, and the dissenting judges below, reject those propositions, the Petition correctly states the issues presented.

Despite ALPA's efforts to revise its rationale and its factual premises, the decision below conflicts with the law announced by this Court and by other circuits as to how to determine whether a union's treatment of minority members of a bargaining unit violates its duty to represent them fairly. The resolution of these issues and conflicts is important, for, as the dissent below notes, the duty's promise of safeguarding of minority rights would be hollow if the tripartite standard for determining whether it has been breached is collapsed into the Seventh Circuit's "single rationality test" (App. 31-32).

2. ALPA ANIMUS—TWO-COURT RULE

The District Court saw this as a case in which ALPA acted for an improper reason, that is, animus toward petitioners. The Seventh Circuit treated it as a mixed motive case, recognizing that ALPA acted out of a desire "to harm the replacements" (App. 22), but postulating that other, rational reasons existed to justify ALPA's actions (*id.*). It pointed to institutional objectives of ALPA and

[1] The case cited for the latter proposition, *Ford Motor Co. v. Huffman*, 345 U.S. 330, 333-34 (1953), sanctioned a change in seniority which protected returning veterans, in accordance with policies adopted by Congress. That holding does not aid ALPA; the change in *Huffman* resulted from an intervening event—a World War creating a phenomenal disruption in service to the employer—and obviously was not based on animus toward any other employees in the bargaining unit.

the supposed equal treatment of all pilots, which the District Court found was not ALPA's true motive (App. 70 and n.11).

ALPA proceeds on a tack which both courts below rejected, claiming that its only "dual motives" were "to restore the pre-strike seniority system" and "to remove the special seniority preference" ALPA claims petitioners had (*e.g.*, Br. in Opp. 17). This effort to read its animus out of the case is but an attack on findings of the district court affirmed on appeal, which this Court generally will not consider. *E.g.*, *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987).[2]

3. ALPA'S IMPLAUSIBLE FACTUAL PRESENTATION

ALPA's attack, moreover, is an implausible one, which not only ignores the affirmative evidence of what its motives included, but tries to bypass without ever attack-

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[2] In this regard, ample evidence supported the view of both courts below that the seniority change was pressed "to harm the replacements," and that ALPA's hostility was not merely some "general" feeling, causally unrelated to the seniority issue (Br. in Opp. 18-19). While the tie could have been inferred from the vehemence and length of ALPA's vendetta, there was far more specific evidence. The hatred was expressed by a ranking ALPA official just before the April 1991 seniority change was made. (App. 67, ¶85.) February, 1991 notes of ALPA's staff for the specific negotiations reflected an urgency to make the change lest a "scab" be able to bid for a captain's position (Pl. Ex. 48); ALPA's chief negotiator had written to a similar effect, if in less colorful language, in December 1990 (Pl. Ex. 45); and ALPA had singled out the seniority issue and threatened not to bargain over other issues unless that issue was first resolved in its favor (App. 60). The "unremarkable causation holding" ALPA claims (Br. in Opp. 19) the courts below made is actually the one it espoused but they properly rejected.

ing as clearly erroneous the finding as to what those motives were not: "ALPA's campaign to adjust pilot seniority rights was not motivated by ALPA's desire to treat all pilots similarly" (App. 70).[3] When ALPA acted to derogate petitioners' seniority, the Seventh Circuit already had held that the competing group ("the 570") were not United Air Lines employees at the relevant time, *ALPA v. United Airlines, Inc.*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987); each had signed an agreement that "[d]uring this training, I understand I will not be an employee of United Airlines" (United Exh. 538). As earlier trainees had come to United as employees under a different arrangement, (802 F.2d at 892), ALPA's claim that it was trying to restore usual seniority practices and to reverse a "preference" or "management discrimination" in petitioners' favor (Br. in Opp. 17, 20), was flawed in its inception. As there was no prior practice of ignoring the difference in employment status, ALPA's action was not restorative nor was putting employees ahead of non-employees in seniority discriminatory.

But the essential point here relates to ALPA's actual motive. It defies the District Court's finding, and reality, to suggest that ALPA would have engaged in a "six year vendetta" (App. 8-9), and made massive economic concessions to United (App. 22), in service of a supposed principle that seniority dates should be unaffected by whether persons were United employees during training. That

[3] ALPA quarrels (Br. in Opp. 16) with our characterizing as "pretextual" its theory as to the basis of its actions (Pet. 16-17). Although the District Court did not use that word, it did find that the theory did not represent a true statement of ALPA's motives. If so, the theory inexorably is therefore pretextual.

could not have been a crucial issue to ALPA, which conceded (see App. 75) that the seniority logically could have been determined in a number of ways.[4] But ALPA's actions are easily explained by its antipathy toward the replacements who aided United in defeating ALPA's strike.

In sum, the dominant theme of ALPA's opposition cannot obscure the true issues which appear on the face of the Seventh Circuit's opinion, as discussed in the Petition.

4. DEGREE OF SCRUTINY OF UNION ACTIONS TOWARD MINORITIES

ALPA misstates the District Court's holding as being that a union with institutional hostility toward non-strikers can never act in a way that favors strikers over them (Br. in Opp. 16). The holding, instead, is that such actions driven by animus as part of a long vendetta in disregard of the union's own promises on which all concerned legitimately relied, violate the duty of fair representation. Also, in contrast to the *carte blanche* the Seventh Circuit gave unions to harm minorities in the bargaining units they control, it is appropriate to scrutinize closely, as other circuits have done (see cases cited at Pet. 13), actions which benefit groups favored by a union over ones it dislikes. Contrary to the Seventh Circuit's view (App. 20), the law has never considered "representation" marred by a desire to harm certain members of a bargaining unit to be "fair." The very theory of all duty of fair representation law makes such limitations on, and careful scrutiny

[4] Petitioners do not think that favoring non-employees over them was ever one of the logical or permissible ways to handle seniority here. And, if truly concerned on the subject, ALPA could have bargained over the terms on which future trainees would be hired, and/or the manner in which their seniority would be computed.

of, union conduct, the minimum standards that must be observed if unions are allowed to claim such persons in determining their right to be the bargaining representative, see *NLRB v. Curtin-Matheson Scientific, Inc.*, 494 U.S. 775 (1990), and then to act collectively for them. ALPA's repeated restatement of the standard of review applied by the Seventh Circuit fails to obscure the issue of whether that standard is too lenient.

5. DISREGARD OF UNION AGREEMENTS

ALPA asserts (Br. in Opp. 13) that "[a]ny contrary interpretation of the duty of fair representation would make it virtually impossible to settle strikes since all unions negotiate to protect strikers in post-strike collective bargaining." This case arises from ALPA's undercutting and ultimate repudiation of an agreement settling a strike; now it contends that unions will be deterred from making such agreements if they have to honor them. That the Seventh Circuit sanctioned this paradigm of bad faith conduct[5] is added reason why review should be granted.

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[5] ALPA persistently understates the reasons why it was found to have acted in bad faith. The District Court found, *inter alia*, that ALPA acted not only for reasons of hostility, indeed hatred (App. 64-70), but in a completely partisan, one-sided manner as between the two groups in the bargaining unit (App. 70-71), and "the fact that ALPA has completely ignored its commitment to never reopen the 570 seniority issue serves as evidence of ALPA's bad faith" (App. 76 n.14).

Contrary to ALPA's implication (Br. in Opp. 14, n.7) its disdain of its promise never to reopen the seniority issue could not be justified had ALPA been brazen enough to act "openly." In fact, however, ALPA acted furtively, purporting to adhere to the agreement for public consumption (App. 56), while "within days" of the 1987 Agreement trying to undo it in negotiations over possible formation of an ESOP which were not visible to the public, nor particularly to petitioners (App. 58).

The brief in opposition is notable for its omission of any good reasons why a union should be able to upset the seniority of a disliked minority years after the issue had been settled. See Petition 13-15.

6. STANDARDS IN MIXED MOTIVE CASE

Apart from its attack on the view of both courts below that it acted "to harm the replacements," ALPA fails (see Br. in Opp. 18-19) to discuss the third question presented by petitioners, that is whether a union that acted for mixed motives, one of which was improper, is automatically absolved of any violation of the duty of fair representation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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